Nos. 91-543; 91-558; and 91-563

In The

Supreme Court of the United States

October Term, 1991

THE STATE OF NEW YORK; THE COUNTY OF ALLEGANY; and THE COUNTY OF CORTLAND,

Petitioners,

vs.

THE UNITED STATES OF AMERICA; JAMES D. WATKINS, as Secretary of Energy; IVAN SELIN, as Chairman of the United States Nuclear Regulatory Commission; THE UNITED STATES NUCLEAR REGULATORY COMMISSION; ADMIRAL JAMES B. BUSEY IV, as Acting Secretary of Transportation; and WILLIAM P. BARR, as United States Attorney General,

Respondents,

STATE OF WASHINGTON, STATE OF NEVADA, and STATE OF SOUTH CAROLINA,

Intervenors-Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONER THE COUNTY OF ALLEGANY

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(18151)

QUESTIONS PRESENTED FOR REVIEW

1. Does the Commerce Clause, Article I, Section 8, Clause 3, empower the national government to compel the states to exercise their reserved sovereign powers to implement a federal policy?

2. Does the Guarantee Clause, Article IV, Section 4, restrict the national government from compelling the states to exercise their reserved sovereign powers to implement a federal policy?

PARTIES

The parties to the proceeding below were:

1. The State of New York, Plaintiff-Appellant;
2. The County of Allegany, New York, Plaintiff-Appellant;
3. The County of Cortland, New York, Plaintiff-Appellant;
4. The United States of America, Defendant-Appellee;
5. James D. Watkins, as Secretary of Energy, Defendant-Appellee;
6. Kenneth M. Carr, as Chairman of the United States Nuclear Regulatory Commission, Defendant-Appellee;[1]
7. The United States Nuclear Regulatory Commission, Defendant-Appellee;
8. Samuel K. Skinner, as Secretary of Transportation, Defendant-Appellee;[2]
9. Richard Thornburgh, as United States Attorney General, Defendant-Appellee;[3]
10. The State of Washington, Intervenor-Appellee;
11. The State of Nevada, Intervenor-Appellee; and
12. The State of South Carolina, Intervenor-Appellee.

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[1] In the proceedings below, Kenneth M. Carr was named as a defendant in his capacity as Chairman of the United States Nuclear Regulatory Commission. Ivan Selin, Mr. Carr's successor in office, has been substituted pursuant to Supreme Court Rule 35.3.

[2] In the proceedings below, Samuel K. Skinner was named as a defendant in his capacity as Secretary of Transportation. Admiral James B. Busey IV, Mr. Skinner's successor in office, has been substituted pursuant to Supreme Court Rule 35.3.

[3] In the proceedings below, Richard Thornburgh was named as a defendant in his capacity as United States Attorney General. William P. Barr, Mr. Thornburgh's successor in office, has been substituted pursuant to Supreme Court Rule 35.3.

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The opinion of the United States Court of Appeals for the Second Circuit, issued on August 8, 1991, is reproduced at page 1 of the appendix to the petition for a writ of certiorari submitted by the County of Allegany, New York (hereinafter "A."), and is reported at 942 F.2d 114 (2d Cir. 1991).

The opinion of the United States District Court for the Northern District of New York (reproduced at A.17) is reported at 757 F. Supp. 10 (N.D.N.Y. 1990).

JURISDICTION

The judgment of the Court of Appeals was dated and entered on August 8, 1991. A.1. Jurisdiction to review the judgment of the Court of Appeals is conferred to this Court by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

The following constitutional provisions, statutes, and regulations are involved in this case.

The Commerce Clause, United States Constitution, Article I Section 8, Clause 3, which provides:

> The Congress shall have the Power...
>
> • • • •
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

The Guarantee Clause of the United States Constitution, Article IV, Section 4, which provides:

> The United States shall guarantee to every State in this Union a Republican Form of Government, and shall pro-

> tect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

The Tenth Amendment to the United States Constitution, which provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The Low-Level Radioactive Waste Policy Amendments Act of 1985, which provides in relevant part:

> (a)(1) Each State shall be responsible for providing, either by itself or in cooperation with other States, for the disposal of —
>
> (A) low-level radioactive waste generated within the State (other than by the Federal Government) that consists of or contains class A, B, or C radioactive waste as defined by section 61.55 of title 10, Code of Federal Regulations, as in effect on January 26, 1983;
>
> (B) low-level radioactive waste described in subparagraph (A) that is generated by the Federal Government except as such waste that is —
>
> (i) owned or generated by the Department of Energy;
>
> (ii) owned or generated by the United States Navy as a result of the decommissioning of vessels of the United States Navy; or
>
> (iii) owned or generated as a result of any research, development, testing, or production of any atomic weapon; and
>
> (C) low-level radioactive waste described in subparagraphs (A) and (B) that it generated outside of the State and accepted for disposal in accordance with sections 2021e or 2021f of this title.

42 U.S.C. § 2021c(a)(1).

* * * *

> If a State (or, where applicable, a compact region) in which low-level radioactive waste is generated is unable to provide for the disposal of all such waste generated within such State or compact region by January 1, 1996, each State in which such waste is generated, upon the request of the generator or owner of the waste, shall take title to the waste, be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of the State to take possession of the waste as soon after January 1, 1996, as the generator or owner notifies the State that the waste is available for shipment.

42 U.S.C. § 2021e(d)(2)(C).

STATEMENT OF THE CASE

Introduction

This case presents two related issues of fundamental importance to the structure of the federal system of the United States.

The first issue is whether the national government is empowered by the Commerce Clause to compel the states to exercise their reserved sovereign powers to carry out a federal policy. The Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. § 2021b *et seq.* (the "Act"), mandates that each state is "responsible" for the disposal of low-level radioactive waste generated within the state. While the states have three options as to how to carry out this responsibility, each requires action by state officials and/or expenditure of state funds. The Court of Appeals held that the Act's mandate was within the power of Congress pursuant to the Commerce Clause and that the federal courts have essentially no role in preserving state sovereignty in the federal system.

The second issue is whether the Guarantee Clause, Article IV, Section 4, bars congressional mandates to the states to carry out a federal policy. The Act requires the officials of each state to comply with a mandate by the national government regardless of the wishes of the people of each state. Petitioner Allegany County argued below that this mandate violates the constitutional guarantee of a republican form of government. The Court of Appeals implicitly held, however, that the Guarantee Clause did not provide any protection of state sovereignty.

These two issues go to the essence of the relationship between the states, the people of the states, and the national government. The use by the national government of schemes comprised of mandates and sanctions threatens to relegate the states to the status of mere departments or agents of the national government.

How The Case Arose

The Act provides that each state is "responsible" for disposal of low-level radioactive waste generated in the state. 42 U.S.C. § 2021c(a)(1). A state's responsibility is not conditioned on any actions by the state, and there is nothing the state can do to avoid this responsibility.

The states can meet their responsibility in only three ways. A state can either (a) alone, or with other states in a compact, develop a low-level radioactive waste disposal facility (42 U.S.C. §§ 2021c and 2021d); or (b) take title and possession of the low-level radioactive waste generated in the state (42 U.S.C. § 2021e[d][2][C]); or (c) become liable to the generators of such waste for all damages caused by the failure of the state to take title and possession of the waste. (42 U.S.C. § 2021e[d][2][C]). Under any of these options, the state is required to exercise its sovereign powers to meet a federally mandated obligation. The

Respondents have previously argued that such a mandate is authorized by the Commerce Clause. U.S. Const. art. I, § 8, cl. 3.

Under compulsion of the Act, the State of New York has enacted various laws and formed a commission to find a site for a low-level radioactive waste disposal facility. This legislation and activity has been the result of the coercive nature of the Act. J.A. 80a-82a[4] (Affidavit of Clarence D. Rappleyea, Jr., sworn to September 5, 1990, ¶¶6-13). In September, 1989, the New York State Low-Level Radioactive Waste Disposal Siting Commission (the "Commission") designated three potential sites, each approximately one mile square, for a low-level radioactive waste disposal facility in the Allegany County Towns of Caneadea, West Almond, and Allen. J.A. 28a (Affidavit of Dolores Cross, sworn to September 5, 1990 ["Cross Aff."], ¶4). These three sites were selected from a candidate area previously identified by the Commission. *Id.*

Thereafter, the Board of Legislators of the County of Allegany enacted various resolutions opposing the selection of the County as a potential location for a low-level radioactive waste disposal facility and indicated the County's "irrevocable" opposition to the disposal facility. J.A. 28a (Cross Aff. ¶5). Nevertheless, the County and various County officials, against their will and against the will of their constituents, have been required to become involved in carrying out the congressional mandate with respect to low-level radioactive waste. J.A. 30a (Cross Aff. ¶10).

[4] "J.A." refers to the Joint Appendix submitted in connection with this proceeding.

Proceedings Below

This action was brought by the State of New York, the County of Allegany, and the County of Cortland to obtain a declaratory judgment that the Act is null and void as violative of the United States Constitution. The federal defendants moved to dismiss the action for failure to state a claim. Thereafter, the District Court permitted a number of private generators of low-level radioactive waste to appear as an *amicus curiae*, in this action.

Subsequently, the States of Washington, Nevada, and South Carolina intervened as parties in this action and appeared in support of the constitutionality of the Act. These three states are the only states that currently have operating commercial low-level radioactive waste disposal facilities. The intervenors thereafter also moved to dismiss the action.

The State of New York and the County of Allegany also made a cross-motion for summary judgment. The defendants and the intervenors also moved for summary judgment.

For example, the Sheriff for Allegany County has been required to serve civil process and to accompany members of the Commission staff on various attempted visits to potential sites. Allegany County facilities such as the county jail, county courthouse, and other buildings have been used for the purpose of holding citizens who have been charged with impeding the actions of the Commission. The Allegany County District Attorney and his staff have been required to become involved in criminal prosecutions of citizens who allegedly illegally impeded the siting process. At various times the State of New York has indicated that the County may have to invoke the "mutual aid" system of police protection. When such "mutual aid" is requested, the County becomes financially liable for the services provided. Innumerable hours have been spent by County officials in setting up procedures to attempt to avoid violence during the siting process. J.A. 29a, 30a (Cross Aff. ¶¶8, 9).

On December 7, 1990, the District Court heard oral argument on all motions and issued its decision. The District Court ruled that *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), was dispositive of the case and barred any judicial intervention to declare the Act unconstitutional. A.21; *State of New York v. United States*, 757 F. Supp. 10, 12 (N.D. N.Y. 1990). The District Court granted the defendants' and intervenors' motion to dismiss the action, and judgment was entered on December 26, 1990. A.26, 27. On January 30, 1991, the State of New York, the County of Allegany, and the County of Cortland filed timely notices of appeal. The appeals were consolidated for hearing and determination by the Court of Appeals.

The appeals were argued before the United States Court of Appeals for the Second Circuit on May 21, 1991. On August 8, 1991, the Court of Appeals affirmed the decision of the District Court. The Court of Appeals agreed with the District Court that *Garcia* was dispositive and barred any judicial intervention. A.15, 16; *State of New York v. United States*, 942 F.2d 114, 121 (2d Cir. 1991).

Allegany County filed a petition for a writ of certiorari on October 3, 1991 (No. 91-558). The State of New York filed a petition for a writ of certiorari on September 30, 1991 (No. 91-543), and Cortland County also filed a petition on October 3, 1991 (No. 91-563). This Court granted all three petitions on January 10, 1992.

Basis For Federal Jurisdiction Of The District Court

The District Court had jurisdiction of this action under 28 U.S.C. § 1331, 28 U.S.C. § 1337, 28 U.S.C. § 2201, and 28 U.S.C. § 1346.

SUMMARY OF ARGUMENT

The Act's mandate that each state is responsible for the disposal of low-level radioactive waste generated within its borders violates the plan of federalism established by the United States Constitution. The principal protection of the sovereignty of each state is the fact that the national government is one of enumerated and, hence, limited powers. If an act of Congress is not within its enumerated powers, the act is unconstitutional and no further inquiry is needed.

Congress has broad power to regulate activity that affects interstate commerce and to use its spending powers to influence state action. However, the Commerce Clause does not authorize the national government to issue directives to the states. In formulating the Constitution, the Framers specifically rejected a scheme whereby the national government would use the machinery of the state governments to carry out its policy decisions. The Guarantee Clause and the Tenth Amendment both establish the separate sovereign nature of the states.

The Court of Appeals failed to consider whether the Act was within the power of Congress. The lower court mistakenly read this Court's decision in *Garcia* to limit any judicial inquiry to determining whether there was a defect in the political process leading to the passage of the Act. In fact, *Garcia* expressly recognizes the federal courts' role in determining whether an act of Congress violates affirmative limits placed on congressional power by the constitutional structure.

Moreover, the Court of Appeals incorrectly held that the Guarantee Clause does not protect the states from direct mandates by the national government. By its terms the Guarantee Clause requires that the United States guarantee to each state a government answerable to the people of the state. The Act ignores this guarantee and, at least with respect to low-level radio-

active waste, renders each state a mere department or agent of the national government. The Act treats the states as divisions of one simple republic, contrary to the plain language of the Constitution and the intent of the Framers.

ARGUMENT

I. THE NATIONAL GOVERNMENT IS NOT EMPOWERED TO COMPEL THE STATES TO EXERCISE THEIR RESERVED SOVEREIGN POWERS.

A. The Constitution established a system of dual sovereignty.

This Court has recently confirmed the separate and independent existence of the states within the federal system.

> As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government. This Court also has recognized this fundamental principle. In *Tafflin v. Levitt*, 493 U.S. 455, 458, 110 S.Ct. 792, 795, 107 L.Ed.2d 887 (1990), "[w]e beg[a]n with the axiom that, under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." Over a hundred years ago, the Court described the constitutional scheme of dual sovereigns:
>
> " '[T]he people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence,' ... '[W]ithout the States in union, there could be no such political body as the United States.' Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the reservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an in-

> destructible Union, composed of indestructible States." *Texas v. White*, 7 Wall. 700, 725, 19 L.Ed. 227 (1869), quoting *Lane County v. Oregon*, 7 Wall. 71, 76, 19 L.Ed. 101 (1869).
>
> The Constitution created a Federal Government of limited powers. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const., Amdt. 10. The States thus retain substantial sovereign authority under our constitutional system.

Gregory v. Ashcroft, 111 S. Ct. 2395, 2399 (1991).

This federal structure of dual sovereignty has numerous advantages for the people of the nation. This system assures (i) a decentralized government more sensitive to the diverse needs of the nation; (ii) increased opportunity for citizen involvement in the democratic processes; (iii) innovation and experimentation in government; and (iv) responsive state governments because of competition for a mobile citizenry. *See Gregory v. Ashcroft*, 111 S. Ct. 2395, 2399 (1991). The federal structure also protects the people of the nation from the tyranny that a single central government could establish. The Federalist No. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961) (in the compound republic of America "a double security arises to the rights of the people" by the division of power between the state governments and the national government and then between the branches of each government).

Schemes authorizing legislation similar to the Act were considered, but rejected, in the drafting of the Constitution. As Justice O'Connor showed by an analysis of notes of the Constitutional Convention in her dissenting opinion in *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742, 791-796 (1982), the Framers rejected the notion that the national government could commandeer the machinery of the state governments to carry out

its policies. The Convention settled on a federal system under which the national government had power to enact legislation that could operate upon the people directly. *Id.* Federal policy would not depend upon the cooperation or the obedience of the state legislatures, as under the Articles of Confederation. *Id.* The Convention also rejected a proposal authorizing the national government to use "force" to compel a state to "fulfill its duty" and a proposal giving the national legislature veto power over state laws. *Id.*

> Under the Articles of Confederation, the National Legislature operated through the States. The Framers could have fortified the central government, while still maintaining the same system, if they had increased Congress' power to demand obedience from state legislatures. In time, this scheme might have relegated the States to mere departments of the National Government.... The Framers, however, eschewed this course, choosing instead to allow Congress to pass laws directly affecting individuals, and rejecting proposals that would have given Congress military or legislative power over state governments. In this way, the Framers established independent state and national sovereigns. The National Government received the power to enact its own laws and to enforce those laws over conflicting state legislation. The States retained the power to govern as sovereigns in fields that Congress cannot or will not pre-empt. This product of the Constitutional Convention, I believe, is fundamentally inconsistent with a system in which either Congress or a state legislature harnesses the legislative powers of the other sovereign.

Federal Energy Regulatory Commission v. Mississipi, 456 U.S. 742, 795-96 (1982) (O'Connor, J., dissenting) (footnotes omitted).[*]

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[*] The majority rejected Justice O'Connor's position that the act in question was unconstitutional on the ground that the act did not mandate an "imposition of general affirmative obligations". *Id.* at 769 n.32. The majority did not, however, voice any disagreement with Justice O'Connor's historical analysis.

Two provisions of the Constitution confirm the existence of the states as separate sovereign governments. The Guarantee Clause, Article IV, Section 4, provides: "The United States shall guarantee to every State in this Union a Republican Form of Government...." The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The combined import of these two provisions is that the states are separate sovereign governments, with general powers, answerable not to the national government but to the people of the states.

B. The Constitution does not authorize congressional mandates to the states.

The Commerce Clause, Article I, Section 8, Clause 3, gives Congress power "[t]o regulate Commerce...among the several States." Neither the text of the Commerce Clause nor the history of its application, however, gives the national government power to mandate that the states carry out federal policies.

While recent decisions of this Court have rejected Tenth Amendment claims by states attacking congressional legislation, none has addressed the issue of a direct congressional mandate to the states to exercise their sovereign powers to carry out a federal policy. These decisions have involved either regulation of state activity which affects interstate commerce or federal tax collection (*e.g., Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 [1985]; *Maryland v. Wirtz*, 392 U.S. 183 [1968]; *South Carolina v. Baker*, 485 U.S. 505 [1988] [taxes]; *Fry v. United States*, 421 U.S. 542 [1975]); the setting of conditions for state involvement in a federally preemptable field (*e.g., Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742 [1982]); or the conditional grant of funds to the states (*e.g., South Dakota v. Adams*, 506 F. Supp. 50 [D.S.D.], *aff'd*, 635

F.2d 698 [8th Cir. 1980], *cert. denied*, 451 U.S. 984 [1981]; *Nevada v. Skinner*, 884 F.2d 445 [9th Cir. 1989], *cert. denied*, 493 U.S. 1070 [1990]).

This Court has thus never decided the constitutionality of a direct congressional mandate to the states based upon the Commerce Clause, although this is not the first time this issue has arisen. In *Environmental Protection Agency v. Brown*, 431 U.S. 99 (1977), this Court granted a petition for a writ of certiorari to review three different Courts of Appeals decisions that held that the Commerce Clause does not authorize a federal mandate to the states requiring the states to either establish programs to carry out a federal policy or else suffer sanctions.

Those three cases, *Maryland v. Environmental Protection Agency*, 530 F.2d 215 (4th Cir. 1975), *District of Columbia v. Train*, 521 F.2d 971 (D.C. Cir. 1975), and *Brown v. Environmental Protection Agency*, 521 F.2d 827 (9th Cir. 1975), dealt with attempts by the national government to implement the Clean Air Act. Pursuant to the Clean Air Act, if an area of a state fails to achieve compliance with air quality standards, the national government may step in and implement its own plan. *Maryland v. Environmental Protection Agency*, 530 F.2d 215, 219 (4th Cir. 1975). In each of the cases, the states failed in their attempts to achieve air quality standards, and the EPA attempted to implement its "plan" by directing the state governments to take certain actions.

The three Courts of Appeals found that these mandates raised constitutional concerns and, therefore, interpreted the Clean Air Act as not authorizing such mandates. *Maryland v. Environmental Protection Agency*, 530 F.2d 215, 225-28 (4th Cir. 1975); *District of Columbia v. Train*, 521 F.2d 971, 994 (D.C. Cir. 1975); *Brown v. Environmental Protection Agency*, 521 F.2d 827, 837-42 (9th Cir. 1975). While the national government could permissibly bring in its own personnel and establish a program, it could

not seize the machinery of a state to carry out a federal action. The United States Court of Appeals for the Fourth Circuit noted:

> And, while it may be true that some, or even many, of the attributes of state sovereignty have been diminished by the exercise by Congress of the broad rights accorded the nation under the commerce clause, it is equally true that if there is any attribute of sovereignty left to the states it is the right of their legislatures to pass, or not to pass, laws. As the Court stated in *In re Duncan*, 139 U.S. 449, 11 S.Ct. 573, 35 L.Ed. 219 (1891):
>
> "By the constitution, a republican form of government is guaranteed to every state in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative powers reposed in representative bodies..." 139 U.S. 449, 461, 11 S.Ct. 573, 577, 35 L.Ed. 219.
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> Not far afield is the rejection by the Philadelphia Convention of Charles Pinkney's constitutional plan which would have enabled Congress to "revise," "negative," or "annul" the laws of a state. See *Elliot's Debates* (Michie Ed., Vol. I, Book I, pp. 149, 400-01).
>
> If the national legislature may not revise, negative or annul a law of a state legislature, how an Act of Congress may be construed to permit an agency of the United States to direct a state legislature to legislate is difficult to understand.

Maryland v. Environmental Protection Agency, 530 F.2d 215, 225 (4th Cir. 1975). *Accord District of Columbia v. Train*, 521 F.2d 971 (D C. Cir. 1975); *Brown v. Environmental Protection Agency*, 521 F.2d 827 (9th Cir. 1975).

Contra, Pennsylvania v. Environmental Protection Agency, 500 F.2d 246 (3d Cir. 1974).

This Court granted certiorari in all three EPA cases but vacated and remanded them for consideration of mootness when the EPA rescinded the objectionable regulations. *Environmental Protection Agency v. Brown*, 431 U.S. 99 (1977) (per curiam).

The bright line between congressional acts which influence, encourage, or regulate state activity, on the one hand, and a direct mandate by Congress to the states to carry out a federal policy, on the other, has now been crossed. As in the EPA cases, the Act's mandate violates the sovereignty of the states within our federal system. Whatever other limits the structure of the Constitution may impose on the exercise of Commerce Clause power, the national government may not direct the states to exercise their sovereign powers to carry out a federal policy. The power to regulate an activity affecting commerce, if willingly engaged in by a state, does not include, or even imply, the power to order a state to engage in such activity. The Constitutional Convention specifically determined not to give Congress such power. *See Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742, 795-96 (1982) (O'Connor, J., dissenting). The Act exceeded the constitutional power of Congress and is therefore null and void.

C. This Court can enforce the "affirmative limits" imposed by the constitutional structure.

In reviewing the Act, the Court of Appeals implicitly held that an analysis based on the text or history of the Constitution was unnecessary. Instead, it held that under *Garcia* and its progeny, absent a defect in the political process or an unequal treatment of a state, the federal courts have no role in protecting any aspect of the sovereignty of the states in the federal system.

No decision of this Court has gone so far in limiting the role of the federal courts. It is the well-established role of the federal courts "to say what the law is." *Marbury v. Madison*, 5 U.S. (1

Cranch) 137,177 (1803). This Court has steadfastly maintained in its Tenth Amendment decisions that it has *ample* power to prevent "the utter destruction of the State as a sovereign political entity." *Marland v. Wirtz*, 392 U.S. 183, 196 (1968); *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 556 (1985); *South Carolina v. Baker*, 485 U.S. 505, 528 (1988) (Scalia, J., concurring).

This Court has never disavowed a role in protecting states from direct congressional mandates. Indeed, in rejecting a number of recent Tenth Amendment challenges to various congressional acts, this Court has been careful to note that the statutes under review did not "authorize the imposition of general affirmative obligations on the States." *See, e.g., Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742, 769 n.32 (1982); *South Carolina v. Baker*, 485 U.S. 505, 514 (1988) ("[t]hat a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect"); *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264, 288 (1981) (congressional act held constitutional when there was "no suggestion that the Act commandeers the legislative processes of the States by compelling them to enact and enforce a federal regulatory program").

The role of the federal courts in protecting state sovereignty from congressional usurptions of power has been recognized since the proposal of the Constitution. In *The Federalist*, James Madison commented that the judiciary would play a vital role in preventing Congress from exceeding its enumerated powers. "In the first instance, the success of the usurpation will depend on the executive and judiciary departments...." The Federalist No. 44, at 286 (James Madison) (Clinton Rossiter ed., 1961).

Alexander Hamilton similarly identified the power of the federal courts to declare unconstitutional congressional acts that exceed the limitations of the Constitution as essential to the preservation of the constitutional structure of the nation. The Federalist No. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("[l]imitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void").

The Court of Appeals below ignored the role of the federal courts in protecting state sovereignty and misread the "national political process" test of *Garcia*. This test by its terms was only intended to apply to statutes which regulate ongoing activity that affects interstate commerce. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 537 (1985) (since municipal railroad affected interstate commerce "[a]ny constitutional exemption from the requirements of the FLSA [Federal Labor Standards Act] therefore must rest on SAMTA's status as a governmental entity rather than on the 'local' nature of its operations"). *See also Maryland v. Wirtz*, 392 U.S. 183, 196-97 (1968) ("[i]f a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, then the State too may be forced to conform its activities to federal regulation").

Garcia also established that the question of whether such otherwise permissible congressional regulation of interstate commerce might somehow objectionably impinge on a state's sovereignty was a matter to be decided by the "national political process". *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 554-56 (1985). Yet this Court in *Garcia* specifically excluded from its consideration any decision as to what other limits may exist.

These cases do not require us to identify or define what af-

> firmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause. *See Coyle v. Oklahoma*, 221 U.S. 559, 55 L.Ed. 853, 31 S.Ct. 688 (1911).

Id. at 556.*

Garcia stands for the proposition that when an act of Congress is within its enumerated powers, the federal court should not limit Congress's exercise of such powers based upon concepts of "traditional governmental functions" of the state government. However, this Court in *Garcia* specifically recognized that the federal courts must still consider "what affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause." *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 556 (1985).

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* The Court of Appeals and the District Court below read the "affirmative limits the constitutional structure might impose" exception of *Garcia* too narrowly. Both lower courts inferred from this Court's citation to *Coyle* that *Garcia* stood for the proposition that the courts could only review congressional acts that upset the "equality" of the states. The decision in *Coyle*, however, was based on congressional interference with state sovereignty and *not* unequal treatment of the states. The Court in *Coyle* held that Congress could not direct the location of the State of Oklahoma's capital as a condition of admission because it could not direct such an order to the other states:

> The power to locate its own seat of government, and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose, are essentially and peculiarly state powers. That one of the original thirteen states could now be shorn of such powers by an act of Congress would not be for a moment entertained. The question, then, comes to this: Can a state be placed upon a plane of inequality with its sister states in the Union if the Congress chooses to impose conditions which so operate, at the time of its admission?

Coyle v. Oklahoma, 221 U.S. 559, 565 (1911).

Therefore, both *Coyle* and *Garcia* recognized limitations on congressional power based on the structure of the Constitution, not simply upon equality among the states.

If the states are to be subjected to mandates from the national government to use their officials and funds to implement federal policies, then they will be less than sovereign entities and, in a real sense, mere agents or departments of the national government. Such a result would undermine the vital roles of the states in the federal system so recently affirmed by this Court in *Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991). It is respectfully submitted that this Court should now act to prevent such a subjugation of the states and to preserve to the people of the United States the benefit of the system of dual sovereignty established by the Constitution.

II. THE ACT VIOLATES THE GUARANTEE OF A "REPUBLICAN FORM OF GOVERNMENT".

A. The Guarantee Clause protects state sovereignty.

The United States is constitutionally required to guarantee to every state in the Union a "Republican Form of Government". U.S. Const. art. IV, § 4. The key feature of a republic is "not only that all power should be derived from the people, but that those intrusted with it should be kept in dependence on the people...." The Federalist No. 37, at 227 (James Madison) (Clinton Rossiter ed., 1961). Each state of the Union is therefore guaranteed a government whereby the officials of a state are answerable to the people of a state and not to the legislature of the national government.

In an insightful article on the role of the Guarantee Clause in protecting state sovereignty, Professor Deborah Jones Merritt of the University of Illinois College of Law has shown that mandates by the national government to state governments to exercise their sovereign powers would violate the Guarantee Clause.

> In a republican government, all power derives from the voters. The citizens of a republican state decide when to exer-

> cise their legislative or executive power and how to wield that authority. If the federal government forces the states to adopt a statute, it destroys this relationship between state voters and their representatives; state legislators become accountable to Congress, rather than to their constituents. Similarly, if the national government compels the states to enforce federal regulatory programs, state budgets and executive resources reflect federal priorities rather than the wishes of local citizens. These results are antithetical to the popular control exerted in a republican form of government.

Deborah J. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 61-62 (1988) (footnotes omitted). *See also* Laurence H. Tribe, *American Constitutional Law* § 5-23 (2d ed. 1988); *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742, 789-91 (1982) (O'Connor, J., dissenting).

The Act represents an unprecedented invasion of state sovereignty by the national government. The mandatory nature of the Act and its sanctions undermine the separate character of the sovereign states and undermines the right of the people of the states to determine the course of their own governments with respect to low-level radioactive waste. New York and its political subdivisions have been required by the national government against the will of their constituents to exercise their sovereign powers to carry out the policies of the Act. *See* J.A. 28a-30a (Cross Aff. ¶¶ 3-11). However, as shown by Justice O'Connor in her dissenting opinion in *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742 (1982), and the Fourth Circuit in *Maryland v. Environmental Protection Agency*, 530 F.2d 215 (4th Cir. 1975), the notion that the national government could use the state governments to carry out federal policy decisions was rejected by the Framers.

B. This Court can enforce the Guarantee Clause's protection of state sovereignty.

The Act's contravention of the Guarantee Clause raises a justiciable issue. This Court has recognized that some Guarantee Clause claims are justiciable.

> [T]he implication of the Guaranty Clause in a case concerning congressional action does not always preclude judicial action. It has been held that the clause gives Congress no power to impose restrictions upon a State's admission which would undercut the constitutional mandate that the State's be on an equal footing. *Coyle v. Smith*, 221 U.S. 559, 55 L. ed. 853, 31 S. Ct. 688. And in *Texas v. White* (US) 7 Wall 700, 19 L. ed. 227, although Congress had determined that the State's government was not republican in form, the State's standing to bring an original action in this Court was sustained.

Baker v. Carr, 369 U.S. 186, 226 n.53 (1962).

A congressional mandate that the states exercise their sovereign powers does not raise a "political question"; it raises an issue striking at the heart of the plan of federalism set forth in the Constitution. The Guarantee Clause does not merely express an ideal; it is an affirmative limit on federal action. As Professor Merritt has noted, a challenge by a state to a mandate by the national government meets the test for justiciability set forth in *Baker v. Carr. See* Deborah J. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 75-78 (1988).

Thus, while the federal courts have been understandably reluctant to consider whether particular schemes of state government are sufficiently "republican" to satisfy the Guarantee Clause, the use of the Guarantee Clause to protect state autonomy is an entirely different matter. As noted by Professor Merritt, this Court considered such a claim in *Coyle v. Oklahoma*, 221 U.S. 559 (1911).

> These decisions suggest that a significant factor in the Supreme Court's refusal to adjudicate claims based on the guarantee clause has been its reluctance to interfere with the independence of state governments. The proposed construction of the guarantee clause, however, would not require the courts to overturn established bodies of state law or eject existing state governments from power. On the contrary, the courts would use the guarantee clause to protect state governments from undue federal interference. As in *Coyle*, claims that Congress has enacted an invalid "limitation upon the power of [a] State" should be justiciable.

Deborah J. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 74-75 (1988) (footnotes omitted).

Professor Laurence Tribe has indicated a similar approach:

> To be sure, the Supreme Court has denied that the guaranty clause of Article IV, § 4, confers judicially cognizable rights upon *individuals*. But it has not avoided all judicial involvement in this sphere; rather, the Court has invoked the equal protection clause of the fourteenth amendment to protect each individual's right to participate in state and local government on an equal footing. And it need not follow from the unavailability of the guaranty clause as a textual source of protection for *individuals* that the clause confers no judicially enforceable rights upon *states as states*. It is, after all, the states to which the clause extends its explicit guarantee. If courts are once again to take up the task of preserving for states their constitutionally essential role as self-governing polities, the guaranty clause might well provide the most felicitous textual home for that enterprise.

Laurence H. Tribe, *American Constitutional Law* § 5-23, at 398 (2d ed. 1988) (emphasis in original) (footnotes omitted). *See also South Carolina v. Baker*, 485 U.S. 505, 531 (1988) (O'Connor, J., dissenting) ("[i]t is also arguable that the States' autonomy is protected from substantial federal incursions by virtue of the Guarantee Clause, Article IV, § 4").

This Court has recently recognized the Guarantee Clause as a potential source of protection of state sovereignty against congressional power.

> These cases stand in recognition of the authority of the people of the States to determine the qualifications of their most important government officials. It is an authority that lies at " 'the heart of representative government.' " *Ibid.* It is a power reserved to the States under the Tenth Amendment and guaranteed them by that provision of the Constitution under which the United States "guarantee[s] to every State in this Union a Republican Form of Government." U.S. Const., Art. IV, § 4. *See Sugarman, supra*, 413 U.S., at 648, 93 S. Ct., at 2850-2851 (citing the Guarantee Clause and the Tenth Amendment). *See also* Merritt, 88 Colum.L.Rev., at 50-55.
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> As against Congress' powers "[t]o regulate Commerce...among the several States," U.S. Const., Art. I, § 8, cl. 3, the authority of the people of the States to determine the qualifications of their government officials may be inviolate.

Gregory v. Ashcroft, 111 S. Ct. 2395, 2402-03 (1991) (footnote omitted).

Here, the Act is destructive of an essential attribute of a republic — the right of the republic and its citizens to decide when and how to exercise the republic's sovereign powers. The Act mandates that the states will be responsible for the disposal of low-level radioactive waste generated in the state — there is no choice. The states, therefore, are no longer treated as confederated republics but as departments or agents of the national government. As such, the state governments are no longer answerable to the people of the states for the exercise of the states' sovereign powers but to the national government. This result violates the constitutional guarantee of a republican form of government to each state.

CONCLUSION

As this Court has recently observed, our Constitution establishes a system of dual sovereigns. The Low-Level Radioactive Waste Policy Amendments Act of 1985, however, is destructive of an essential attribute of this system — the rights of the states and their citizens to decide when and how to exercise the states' sovereign powers. By decreeing that the states are responsible for the disposal of low-radioactive wastes generated within the state, the national government treats the states as its mere agents or departments.

The lower court erred in allowing the national government to ignore the sovereign nature of the states and in denying that the federal courts have a legitimate role in protecting state sovereignty.

Dual sovereignty and judicial review are basic components of a constitutional structure that has served this nation well for over two hundred years. Such a vital protection of the people's liberty and access to government should not be abandoned based on a claim that the Act constitutes an expedient assignment of responsibility for disposal of low-level radioactive waste. It is respectfully submitted that the decision of the Court of Appeals should be reversed and the Act should be declared unconstitutional.

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